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Calendar No. 804

101ST CONGRESS *2d Session*	SENATE	REPORT 101-450

INDEPENDENT SAFETY BOARD ACT AMENDMENTS OF 1990

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 3012

AUGUST 30, 1990.—Ordered to be printed

Filed under authority of the order of the Senate of August 2 (legislative day, July 10), 1990

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 3012]

The Committee on Commerce, Science, and Transportation, having considered an original bill (S. 3012) to amend the Independent Safety Board Act of 1974 to authorize appropriations for fiscal years 1991, 1992, and 1993, and for other purposes, recommends that the bill do pass.

PURPOSE OF THE BILL

The legislation, as reported, would amend certain provisions in the Independent Safety Board Act of 1974 (Safety Board Act) and authorize $32 million, $38.6 million, and $38.8 million for the activities of the National Transportation Safety Board (NTSB) for fiscal year (FY) 1991, 1992, and 1993, respectively.

BACKGROUND AND NEEDS

Public Law 100-372 authorized the NTSB for FY 1988, 1989, and 1990 in the amounts of $25,400,000, $27 million and $28,600,000, respectively. The authorization expired on September 30, 1990.

The NTSB was created by the Department of Transportation Act of 1966, and made an independent agency by the Safety Board Act. The NTSB is primarily responsible for investigating and determining the causes of aviation, highway, rail, pipeline and marine accidents. In FY 1988, for example, the NTSB investigated 2,694 acci-

dents, resulting in 365 recommendations to Federal, State and local agencies to improve transportation safety. In FY 1989, the NTSB investigated 2,580 accidents, resulting in 491 recomendations. The NTSB also sent out "go-teams" to investigate 51 major accidents in FY 1990.

The NTSB's mission, as the independent arm of the Federal government to investigate accidents and make recommendations to improve safety, is critical. The NTSB, for example, recently completed its investigation of the Exxon Valdez oil spill, an extremely time-consuming and expensive review of a major environmental disaster. The NTSB also has undertaken an examination of the use of drugs and alcohol by transportation employees and recently released a study, which covered a one-year period from October 1, 1987 through September 30, 1988 and was based on data from 8 states. That study on the use of these substances by truck drivers indicated that of 182 truck drivers that died, approximately 33 percent had alcohol or drugs in their systems.

All the NTSB's resources are devoted to improving safety. This bill, as reported, will allow the NTSB to have the workforce and resources necessary to continue its important safety mission.

Legislative History

On May 10, 1990, the Aviation Subcommittee held a hearing on the reauthorization of the NTSB. Mr. Kolstad, Chairman of the NTSB, explained the agency's three-year reauthorization request as well as the changes sought in the NTSM's statutory authority. Representatives from the Air Line Pilots Association (ALPA) testified on the need for legislation limiting the release of information from cockpit voice recorders (CVRs). On July 31, 1990, the Committee met in open executive session to consider the reauthorization of the NTSB and, without objection, ordered favorably reported an original bill.

Summary of Major Provisions

The reauthorization bill covers three fiscal years, and also clarifies the scope of NTSB's authority in certain areas. The major provisions include:

1. an authorization for $32 million in FY 1991, $38,600,000 in FY 1992, and $38,800,000 in FY 1993;
2. a specific limitation on the circumstances under which CVR information can be used in a court of law and a timeframe under which the NTSB would make available such information during its investigation into an accident;
3. a provision clarifying NTSB's authority to conduct investigations; and
4. the addition of the word "vessel" to the list of equipment the NTSB is authorized to examine.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget

Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC August 2, 1990.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for the Independent Safety Board Act Amendments of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: Not yet assigned.
2. Bill title: Independent Safety Board Act Amendments of 1990.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, July 31, 1990.
4. Bill purpose: This bill would authorized appropriations for the activities of the National Transportation Safety Board (NTSB) for fiscal year 1991 through 1993. The bill would authorize $32.0 million for 1991, $38.6 million for 1992, and $38.8 million for 1993. The NTSB received an appropriation of $27.2 million for fiscal year 1990.

The bill also would:

Clarify the authority of the NTSB to conduct tests of vehicles, vessels, rolling stock, track or pipeline components as part of an accident investigation;

Modify existing law concerning disclosure of the transcripts of cockpit voice recorder recordings; and

Limit discovery in judicial proceedings of these recordings and of portions of transcripts not already made public by the NTSB.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Authorization Level	32	39	39		
Estimated Outlays	29	38	39	4	

The costs of this bill fall within budget function 400.

Basis of Estimate: CBO assumed that the full amounts authorized would be appropriated. The outlay estimate is based on historical spending rates for similar programs.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: CBO previously prepared a cost estimate for H.R. 5132, the Independent Safety Board Act of 1974 Amend-

ments Act of 1990, as ordered reported by the House Committee on Public Works and Transportation. That estimate was transmitted on July 17, 1990. These bills are very similar, but the House bill would authorize $31 million for fiscal year 1991, while the Senate bill would authorize $32 million. Other than this difference, the estimated costs of the two bills are identical.

8. Previous CBO estimate: None.

9. Estimate prepared by: Marjorie Miller.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The bill would not subject any business or individual to additional regulation and, therefore, would not have any impact on such individuals or businesses. The NTSB does not have regulatory authority, but rather authority to investigate the causes of accidents and the corresponding authority to recommended actions to improve safety. Section 2 of the bill authorizes appropriations of $32 million, $38,600,000 and $38,800,000 in FYs 1991, 1992, and 1993, respectively. These sums are modest, and any impact on the economy will be minimal. Safety investigations and any resulting recommendations ultimately save lives and limit damage to property, and thus the funds authorized should have a positive impact on the economy. The bill, as reported, also would not have any adverse impact on the personal privacy of individuals and in fact should protect the privacy interests of airline pilots through a specific limitation on the circumstances under which CVR information would be made available. No additional paperwork is expected to result from the bill.

Section-by-Section Analysis

SECTION 1.—SHORT TITLE

This section cites the short title as the "Independent Safety Board Act Amendments of 1990."

SECTION 2.—AUTHORIZATION OF APPROPRIATIONS

The reauthorization levels are as follows: FY 1991, $32 million; FY 1992, $38,600,000; and FY 1993, $38,800,000.

The FY 1991 authorization would permit the NTSB to increase full-time equivalencies (FTEs), which would raise the staffing level of the NTSB to 356 FTEs (from 326). The increases in FY 1992 and FY 1993 primarily represent an increase in FTEs (to 381), as well as provide for one-time funding of new laboratory and computer equipment and relocation of regional offices to the suburbs of Los Angeles, CA, New York City, NY, and Fort Worth, TX.

SECTION 3.—EXAMINATION AND TESTING

The section clarifies the NTSB's ability to investigate occurrences onboard *vessels* by amending section 304(b)(2) of the Safety

Board Act. The existing section includes the terms "vehicle, rolling stock, track, or pipeline component," and, while NTSB has defined the term "vehicle" broadly, addition of the word "vessel" to section 304(b)(2) will clarify the NTSB's responsibilities.

The change, however, does not in any way expand the scope of the NTSB's authority to investigate maritime accidents. In a letter dated June 27, 1990, to the Chairman of the House Committee on Public Works and Transportation, the Chairman of the NTSB explained the intent of this change and stated: "[t]he technical amendment is not intended to and would not confer any jurisdiction over accidents the Board currently has no power to investigate. Specifically, it is not intended and would not expand the Board's authority to investigate accidents of foreign flag vessels in international waters."

In addition, this section amends section 304(b) to specify that, in conducting accident investigatory testing, the NTSB retains discretion as to how such tests shall be conducted. The NTSB has had some difficulty with courts intervening in the investigatory process with respect to testing because of pending tort suits.

In the recent past, tort litigants increasingly have initiated law suits against the NTSB to gain access to and/or establish control over ongoing aircraft accident investigations being conducted by the NTSB. Courts typically have recognized and appreciated the important public purpose served by the NTSB's ability to conduct prompt investigations without the burdens and interference that would stem from injecting the civil litigation interests into the NTSB's accident investigation process. *Graham* v. *Teledyne-Continental Motors*, 805 F.2d 1386 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 67 (1987); *Miller* v. *Rich*, 723 F.Supp. 505 (C.D. Cal. 1989). These cases, however, have resulted in needless delays in these investigations and have required the expenditure of considerable resources by the NTSB and Department of Justice. The time devoted by NTSB investigations in defending their decisions diverts the energies that they should be directing to investigating the accidents.

Of even greater concern is a recent development in one case which underscores the need for legislative refinement. In an unpublished order arising from the NTSB's investigation of the United Airlines accident at Sioux City, IA, on July 19, 1989, a court directed that there be no destructive tests on a piece of the rotor fan disk except at an independent laboratory, or in the alternative, that the Board be required to furnish the court with a protocol of any proposed testing along with a factual statement containing the bases for such tests. *Woulfe, et al.*, v. *United States, et al.*, No. 89 C 7822 (N.E. Ill., November 20, 1989).

The Committee recognizes that both the NTSB and litigants have an interest in examining and testing wreckage, but the Committee strongly believes that the ability of the NTSB to conduct investigations independently, thoroughly, and in a timely manner for the benefit of the public, should not be compromised. The basis for vital corrective action may not be discovered in as timely a manner if the immediate needs of an NTSB accident investigation do not take precedence over the needs of ancillary civil litigation. The NTSB must be able to determine where, how, and when testing

will be performed and who will be allowed to participate in the investigations.

The amendment to section 304(b) made by this section does not constitute any change in the NTSB's existing authority. For example, while the amendment confirms that the control of investigations is held by the NTSB, it is not meant to change the existing arrangements for marine investigations where consultation and cooperation with the Coast Guard occur. Rather, this provision will simply ensure that there will be no erosion in the NTSB's control over its investigations. It will enable the NTSB to exercise its appropriate discretion and authority.

SECTION 4.—COCKPIT VOICE RECORDINGS AND TRANSCRIPTIONS

This section limits release of CVR information, specifies when it can be released, and permits discovery of the transcription and recording in certain limited circumstances.

Section 306 of the Safety Board Act provides that CVR recordings and transcripts are not to be released, except that portions of the transcriptions of oral communications by and between the flight crew members and ground stations are to be made available to the public at the time of the public hearing or no later than 60 days following an accident or incident under investigation.

This section amends section 306 to direct that the release of the CVR information occur at the public hearing or, if no public hearing is held, when the majority of the other factual information is placed in the public docket. This provision avoids imposing a date certain on the release of information and also ensures that when the information is released, it is done so in the context of the rest of the accident investigation.

This section also amends section 306 to restrict the ability of litigants to misuse the recording or transcription in a lawsuit by setting standards for discovery and requiring that, if discovery of nonpublic portions of a recording or transcript is obtained, a protective order is to be issued limiting the use of the information to that proceeding. It also prohibits dissemination of the recording or portion to anyone who does not need the information for the proceeding. This provision is intended to eliminate the use of such information except to ensure that litigants are able to receive a fair trial.

In two incidents outlined in testimony before the Committee (see the testimony of the ALPA at the May 10, 1990, Aviation Subcommittee hearing on the NTSB), the transcription in one case and the recording in another case were released to the public in an inappropriate manner. All parties to an accident investigation recognize both the rights to privacy of the individual crewmembers and the need to conduct a full and fair investigation. This section seeks to maintain a balance between those interests. The section is not intended, however, to restrict the parties to the investigation in any way from access to the CVR information, prior to public disclosure, for purposes of the investigation.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as

reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

INDEPENDENT SAFETY BOARD ACT OF 1974

Section 304 of that Act

GENERAL PROVISIONS

SEC. 304. (a) * * *

(b) POWERS OF BOARD.—(1) * * *

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation, including examination or testing of any *vessel,* vehicle, rolling stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. Any examination or testing shall be conducted in such manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such *vessel,* vehicle, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accidents, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection, examination, or test shall be commenced and completed with reasonable promptness and the results of such inspection, examination, or test made available. *The Board shall have sole authority to determine the manner in which testing will be carried out under this paragraph and under section 701(c) of the Federal Aviation Act of 1958, including determining the persons who will conduct the test, the type of test which will be conducted, and the persons who will witness the test. Such determinations are committed to the discretion of the Board and shall be made on the basis of the needs of the investigation being conducted by the Board and, where applicable, the provisions of this paragraph.*

(3) through (11) * * *

(c) through (d) * * *

Section 306 of that Act

PUBLIC ACCESS TO INFORMATION

SEC. 306. (a) * * *

(b) * * *

[(c) COCKPIT VOICE RECORDER.—Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board: *Provided*, That portions of a transcrip-

tion of such oral communications which the Board deems relevant and pertinent to the accident or incident shall be made available to the public by the Board at the time of the Board's public hearing, and in no event later than 60 days following the accident or incidents: *And provided further,* That nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.]

(c) PUBLIC DISCLOSURE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS.—(1) Notwithstanding any other provision of law, the Board shall withhold from public disclosure cockpit voice recorder recordings and transcriptions, in whole or in part, of oral communications by and between flight crew members and ground stations, that are associated with accidents or incidents investigated by the Board.

(2) Portions of a transcription of oral communications described in paragraph (1) which the Board determines relevant and pertinent to the accident or incident under investigation shall be made available to the public by the Board—

(A) if the Board conducts a public hearing with respect to such accident or incident, at the time of such hearing; and

(B) if the Board does not conduct such a public hearing, at the time when a majority of other factual reports regarding the accident or incident is placed in the public docket.

(3) Nothing in this section shall restrict the Board at any time from referring to cockpit voice recorder information in making safety recommendations.

(d) USE OF COCKPIT VOICE RECORDER RECORDINGS AND TRANSCRIPTIONS IN JUDICIAL PROCEEDINGS.—(1) Except as provided in this subsection, in a judicial proceeding, there shall not be discovery by a party—

(A) of portions of cockpit voice recorder transcriptions other than such portions made available to the public by the Board under subsection (c)(2); and

(B) of cockpit voice recorder recordings.

(2) Subject to paragraph (4), a court may permit discovery of cockpit voice recorder transcriptions by a party if the court, after an in camera review of such transcriptions, finds that—

(A) the portions of the transcriptions made available to the public under subsection (c) do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of additional portions of transcriptions is necessary to provide the party with sufficient information for the party to receive a fair trial. No cockpit voice recorder transcriptions prepared by or under the direction of the Board, other than portions made available by the Board under subsection (c), shall be required to be produced for an in camera review, or shall be subject to discovery, unless the cockpit voice recorder recordings are not available.

(3) Subject to paragraph (4), a court may permit discovery of cockpit voice recorder recordings by a party if the court, after an in camera review of such recordings, finds that—

(A) the portions of transcriptions made available to the public under subsection (c) and to the party through discovery under

paragraph (2) do not provide the party with sufficient information for the party to receive a fair trial; and

(B) discovery of cockpit voice recorder recordings is necessary to provide the party with sufficient information for the party to receive a fair trial.

(4) If, under paragraph (2) or (3), there is discovery in a judicial proceeding of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2), the court shall issue a protective order to limit the use of such recording or portion to the judicial proceeding and to prohibit dissemination of such recording or portion to any person who does not need access to such recording or portion for such proceeding.

(5) A court may permit admission of a cockpit voice recorder recording or any portion of a cockpit voice recorder transcription not made available to the public under subsection (c)(2) into evidence in a judicial proceeding, only if the court places such recording or portion under seal to preclude the use of such recording or portion for purposes other than for such proceeding.

Section 309 of that Act

AUTHORIZATION OF APPROPRIATIONS

SEC. 309. (a) There are authorized to be appropriated for the purposes of this Act not to exceed $12,000,000 for the fiscal year ending June 30, 1975; and $12,000,000 for the fiscal year ending June 30, 1976, such sums to remain available until expended. There are authorized to be appropriated for the purpose of this Act not to exceed $3,800,000 for the transition quarter ending September 30, 1976, $15,200,000 for the fiscal year ending September 30, 1977, and $16,400,000 for the fiscal year ending September 30, 1978, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed $16,420,000 for the fiscal year ending September 30, 1979, and $17,650,000 for the fiscal year ending September 30, 1980, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed $18,540,000 for the fiscal year ending September 30, 1981, $19,925,000 for the fiscal year ending September 30, 1982, and $22,100,000 for the fiscal year ending September 30, 1983, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed $22,600,000 for the fiscal year ending September 30, 1984, $24,500,000 for the fiscal year ending September 30, 1985, and $26,100,000 for the fiscal year ending September 30, 1986, such sums to remain available until expended. There are authorized to be appropriated for the purposes of this Act not to exceed $25,400,000 for the fiscal year ending September 30, 1988; $27,000,000 for the fiscal year ending September 30, 1989; and $28,600,000 for fiscal year ending September 30, 1990. Such sums shall remain available until expended. *There are authorized to be appropriated for the purposes of this Act not to exceed $32,000,000 for the fiscal year ending September 30, 1991; $38,600,000 for the fiscal year ending September 30, 1992; and $38,800,000 for the fiscal*

year ending September 30, 1993, such sums to remain available until expended.

(b) * * *

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